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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-159

FIRST NATIONAL BANK IN PALM BEACH AND PHILLIP D.O'CONNELL, CO-TRUSTEES OF A TRUST CREATED BY THE WILL OF MICHEL A. KELLY,

Petitioners

versus

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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v.

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STATEMENT

The petition for writ of certiorari was filed in this case on August 3, 1971, and the brief of the United States in opposition was filed on or about October 21, 1971. This reply is being filed pursuant to Rule 35.4 of the Rules of the Supreme Court of the United States.

ARGUMENT

1. The question here presented has not been mooted by the Tax Reform Act of 1969.

The government has asserted that the question presented here has been mooted for the future by recent amendments to Section 2055 enacted in the Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487,560. Presumably, this was included in the government's brief as an indirect argument that the issue involved is not of significant importance. As such, the government's allegation is misleading.

Section 201(g)(4)(A) of the Tax Reform Act sets out the effective dates of the amendments which will eventually render the question moot. Generally, the amendments apply in the case of decedents dying after 1969. However, certain transitional rules provide that the amendments are not applicable (i) in the case of a will executed on or before October 9, 1969, if the decedent dies prior to October 9, 1972, without having republished his will, by codicil or otherwise; (ii) if, on October 9, 1969, the decedent had no right to change the terms of the will; or (iii) if the decedent is under a mental disability precluding a change in the will. Thus, it is clear that the issue will not be mooted with respect to many decedents dying prior to October 9, 1972.

Even more critical is the current importance of this issue. Upon information and belief, it is understood that records of the Chief Counsel of the Internal Revenue Service indicate that in May, 1971, there were 48 pending cases involving the issue here presented. When it is recognized that estate

tax returns are due 15 months after the death of decedents dying on or before December 31, 1970, and nine months after the death of decedents dying after that date; that, without regard to extensions of time for filing such returns, there is a three year period of limitation within which the Commissioner can make a deficiency determination; and that in many cases the estate can pay the tax within a two year period and file a Claim for Refund which itself can be processed through administrative channels, it is apparent that the 48 docketed cases represent only a small fraction of the number of cases involving this issue. Clearly, the issue has not been rendered moot for the foreseeable future by the Tax Reform Act.

2. The issue does not turn on local law that is peculiar to any jurisdiction, but rather on an interpretation of what is required by the Internal Revenue Code, and thus there is a conflict between Circuits.

The government's brief in opposition alleges that there is no conflict between Circuits since the opinions issued by the various Circuit Courts have reached different results by application of controlling state laws. In this connection, it should be noted that an opinion rendered after the initial petition for certiorari held against the government giving rise to an additional conflict. Greer v. United States (4th Cir. 1971) ____ F.2d____, unofficially reported at 1971 P-H p. 148,708.

Absolutely no purpose can be served by citing the authorities from the various jurisdictions. It is the universal rule that a

trustee administering an estate for present beneficiaries of income and successive beneficiaries of principal is under a duty to deal impartially. See: 51 Am. Jur.2d 247; Life Tenants and Remaindermen §26. The only question involved in the decided cases is whether this duty of impartiality is a sufficient safeguard, thereby rendering the value of the remainder interest ascertainable. The First, Third and Fourth Circuits have held that it is. Old Colony Trust Company v. United States (1st Cir. 1970) 423 F.2d 601; Peoples Trust Company of Bergen County v. United States (3rd Cir. 1971) ___ F.2d ___, unofficially reported at 1971 P-H p. 148,639; Greer v. United States, supra. The Fifth Circuit held in the instant case that it is not. This is clearly a conflict between the Circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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I hereby certify that on this _____ day of November, 1971, three copies of the foregoing Reply to Brief for the United States in Opposition, were served upon the Solicitor General, Department of Justice, Washington, D. C. 20530, by mailing said copies by United States mail, postage prepaid to the address indicated above.

_____

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